No. 12,023

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

and

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES, APPELLANT

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CITATIONS

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OPINION BELOW

The opinion of the district court (R. 461-504) is reported at 72 F. Supp. 903.

JURISDICTION

This is an appeal from a judgment entered November 5, 1947 (R. 504-507). On February 3, 1948, the United States filed notice of appeal (R. 508). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225(a), now 28 U. S. C. sec. 1291.

The United States instituted in the district court 13 suits to condemn land.[1] On February 17, 1945, in so far as they concerned the Honolulu Plantation Company, seven of these suits were consolidated (R. 433). On November 22, 1946, the remaining six and the previously consolidated proceeding were consolidated (R. 459-460). The jurisdiction of the district court was invoked under section 201 of the Act of March 27, 1942, 56 Stat. 176, 177, 50 U. S. C. sec. 171(a) (R. 11, 37, 71, 91, 110, 195, 201, 226, 298, 324, 355, 372, 398).

QUESTION PRESENTED

Whether, when there is no claim for compensation for property condemned but only for the resultant diminution in the value of the remainder, an award may be sustained where the only evidence was as to the difference between the value of the whole before the taking and the value of the remainder thereafter.

STATEMENT

Between June 21, 1944, and December 6, 1945, the United States instituted 13 suits to condemn land in Hawaii needed by the Navy. In consequence, the Honolulu Plantation Company made a number of claims for compensation. To some extent these claims have been disposed of. Thus, prior to the trial of the instant case, the company was paid $285,000, the agreed value of sugar cane growing on some of the land (R. 437-440). Further, in this case by provisions of the judgment not embraced by this appeal, it was awarded $38,988 for the fee to 4.836 acres and $15,585 for parts of an irrigation ditch (R. 504-507). However, the judgment also awards the company $440,175 for damages allegedly inflicted upon its remaining property by the condemnation of 440.175 acres which it was using to grow sugar cane. From that award this appeal has been taken.

The Honolulu Plantation Company grew sugar cane which it converted into sugar (R. 530, 574). The company had a

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[1] The pleadings in these cases are found in Volume I of the printed record. A summary of the filing dates is found at R. 5-8.

refinery and other auxiliary works (R. 544-551). The lands were served by an irrigation system (R. 535-540). When the first of these suits was commenced, the company was using about 4300 acres for the growing of cane (R. 552, 586, 687). When the last had been filed, 1087.59 acres of the growing area had been condemned.

It developed that the company owned 2.912 of these acres (Ex. 12, R. 1537; R. 496). The rest it claimed to have under lease. But it did not seek any part of the compensation due for any of the acreage. It contended, however, that the value of the land and structures remaining to it was diminished by the loss of the 1087.59 acres and that consequently it was entitled to severance damages. In support of the assertion, it made the following showing:

The cane grown on the 4300 acres could be converted into 22,000 tons of raw sugar (R. 569, 689, 1050). The 1087.59 acres could not be replaced (R. 1063) and the remaining lands would produce only 15,000 tons (R. 570-571, 689, 1050). In the judgment of those managing the company it was not practicable to make up the difference by purchases (R. 570, 1064-1065). Consequently, the refinery, which could produce annually from 30,000 to 35,000 tons of raw sugar (R. 567), had even more surplus capacity than before. The irrigation system also was larger than was warranted by the smaller growing area (R. 572, 1055-1056).

The company called Messrs. S. L. Austin, G. L. Schmutz and C. C. Crozier to testify to the damage. Each valued the plantation at about $1,000 per acre of cane-growing lands (R. 606, 687, 688, 736, 739, 873). They first testified to its value before the takings: Austin who thought that at that time there were about 4,300 acres of cane lands (R. 552) valued the plantation at $4,300,000 (R. 582; see R. 578). Schmutz on the assumption of 4,283 acres (R. 687, 733) valued at $4,200,000 (R. 686; see R. 679). On the basis of 4,400 acres Crozier believed it was worth $4,000,000 (R. 873). Next, testifying as to value of the plantation after loss of the 1,087.59 acres, each concluded that it was then

worth about $1,000,000 less than before (R. 582-583, 687, 890).[2]

Each explained his use of the $1,000-an-acre figure. Mr. Austin said it was "more or less the rule of thumb * * * from the standpoint of taking values and from talking to others, and the amount of capital required for a plantation the size of Honolulu Plantation Company, for putting in all the various equipment necessary to run a plantation that it would come to about that figure" (R. 606). Mr. Schmutz testified that it was the "common notion in the community regarding the investment in irrigated cane lands per acre, which was $1,000 an acre for plantations which did not have a refinery"[3] (R. 688). Mr. Crozier said: "Well, it's one of the methods that can be developed as the rate per acre for a leasehold plantation insofar as the value of money in an enterprise, in its capital as a leasehold plantation, to operate and produce sugar. And that will vary with the size and many factors in it. But I should imagine that the 30, the 25,000 ton plantation, as a leasehold, would require * * * a thousand dollars per acre of capital to carry on the enterprise, starting with the virgin land * * * and weeding it, fencing it, and the ditches and everything else that goes with the enterprise" (R. 873).

Use of the rule automatically produces valuations. If, for example, the plantation had comprised 5,500 acres of leased land, it would have been worth approximately $5,500,000 (R. 593). In case it had lost any of these lands, its value would have diminished at the rate of $1,000 per acre lost (R. 604-606). Specifically, if before the takings here

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[2] As of January 1, 1947 (R. 1067), the remaining physical assets were sold to the Oahu Sugar Company for $3,750,000 (R. 1149). Net current assets excluded from the sale amounted to $1,000,000 (R. 1151). Mr. P. E. Spalding testified that Oahu bought the properties because it had lost cane lands (R. 1073) and that it was selling the refinery—the only one in Hawaii (R. 1102)—to California and Hawaiian Sugar Refining Company for $1,250,000 (R. 1104).

[3] Schmutz testified he took into account eight factors (R. 676-678). However, it is evident he was controlled by the $1,000-an-acre measure (R. 687, 688, 706, 708, 736). This was the construction put on his testimony by the trial court (R. 489).

involved, the leased lands of the company did not include the 1087.59 acres considered by the witnesses, its value at that time was not the amount arrived at by them but whatever result would be reached by applying $1,000 to the acreage in fact under lease (R. 706, 708, 736, 888).

As has been said (p. 2, *supra*), the trial court awarded the company $440,175. Thus, it accepted—with evident reluctance—the theory of valuation proposed by the company's witnesses. As it said (R. 489-491):

> Here, to say the least, the situation is confusing. First, the evidence reveals that this claim formed a part of a larger claim made to the 79th Congress, and the Company represented to Congress in unmistakable language that it was asking for relief at its hands because it had suffered a capital or business loss for which it had no remedy at law.[4]
>
> Secondly, though a prudent buyer, to be sure, would take general note of all the factors mentioned by the experts [Schmutz and Crozier], nevertheless stripped of all the generalities, the experts essentially base their judgment upon the same point as the former plantation manager [Austin], that is, all said that the Company suffered a capital loss at the rate of $1,000 per cane acre as it takes that number of dollars to turn virgin land into land capable of growing sugar cane successfully. Thus far, as before Congress, the Company is talking the language of a capital loss. But here [the Company] takes a step beyond, and
>
> Thirdly, envelopes itself in the language of [*Baetjer* v. *United States,* 143 F. 2d 391 (C.C.A. 1, 1944), certiorari denied 323 U. S. 772]. At this point the witnesses, carrying forward the picture of what has happened, theoretically place what is left upon the block in the market place and then, viewing it from the eyes of a buyer, say with the First Circuit Court that it is not worth the amount of invested capital which it represents but something substantially less, and

[4] The claim itself is not in the printed record. A favorable report of the Committee on Claims of the House of Representatives together with disapproving letters from the Attorney General, the Secretary of the Navy and the Acting Secretary of War (H. Rep. No. 1313, 79th Cong. 1st sess.) is found at R. 1542-1566.

therefore what has happened to the Company has depreciated the value of its remaining property.

It would seem that as if by magic a noncompensable capital loss has now become a loss of real property value.

* * * Here all the evidence and the only evidence, as given by two expert appraisers and two men experienced in plantation affairs, is that the over-capacity of the mill due to the limited acreage available to supply it not only made the Company economically unprofitable but those same facts depreciated the market value of the remaining property, for a buyer being able to do no better than the Company could in this situation would pay less, at the rate of $1,000 an acre for each cane acre taken, for what was left of the plantation's physical property and its permanent improvements.

Although not a little disturbed by the facility by which an admitted capital or business loss is transformed into a loss of real property value, theory must yield to the reality of the market price where values are established.

* * * Considered in this practical light, I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken.

However, the trial court declined to apply the $1,000-per-acre figure to the 1,087.59 acres considered by the company's witnesses. It found that 598.795 acres were being used by sufferance (R. 492, 497-503) and 48.61 acres under a lease which entitled the lessor to all compensation if the land was condemned (R. 493, 1351-1352). It found the remaining 440.175 acres had been valuable to the company (R. 496). Of these, 2.912 acres were owned by the company. The rest were occupied under leases by which in the event of condemnation the company relinquished its right to share in the compensation awarded for the leased land but was permitted to claim for damages to its remaining properties "so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors" (Ex. 9-G, R. 1443-1444; Ex. 9-I, R. 1468-1469; Ex. 9-J, R. 1500-1501).

SPECIFICATIONS OF ERROR

The statement of points relied on by the United States on its appeal (R. 512) is as follows:

The district court erred:

1. In holding that the Honolulu Plantation Company was entitled to severance damages.

2. In making any award to the Honolulu Plantation Company on account of severance damages.

3. In awarding the Honolulu Plantation Company $440,175 as severance damages.

SUMMARY OF ARGUMENT

Where part of a tract of land is taken, just compensation includes, in addition to the value of the part taken, any diminution in the value of the remainder caused by the taking, or "severance damages." The measure of that compensation is the difference between the value of the whole before the taking and the value thereafter of the remainder—a measure which necessarily comprehends the value of what has been taken.

Here, by clauses contained in the leases, the company had relinquished to the fee owners its interest in the value of the condemned land. Nonetheless, it claimed as severance damages the difference between the value of the whole before the taking and of the remainder thereafter. On this basis the court made its award. But this difference represents the relinquished interest in the condemned land and not a diminution in the value of the remainder. This is disclosed by an application the company made to Congress for relief from the loss suffered because of this relinquishment.

Although the company had contracted to relinquish its interest in the leased lands in event of condemnation, this interest contributed to the pre-condemnation value of the plantation. So when the company's witnesses testified to that value they included the increment in value created by the company. And when they testified to the value of the remainder, they excluded the increment because, condemnation having occurred, it had passed to the owners. Con-

sequently, the difference between the two figures represents the value of the land taken.

There was no proof that, as the trial court seemed to think, the company's "remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken" (R. 491). The testimony merely was that each cane acre taken diminished the value of the whole plantation by $1,000. The remainder was worth as much as it had been worth when part of the larger plantation.

The decision in *Baetjer* v. *United States,* 143 F. 2d 391, 396 (C.C.A 1, 1944), certiorari denied 323 U. S. 772, is not in point. In the instant case, there was no testimony that the claimed damages to the remainder occurred because the company had become unprofitable. Therefore, there is no occasion to consider whether, as was the view of the *Baetjer* opinion, the inability profitably to operate the remainder would diminish its market value and so give rise to severance damages.

ARGUMENT

The Award Is for the Land That Was Taken and Not for Damages to the Remaining Land

In case part of a tract of land is taken, just compensation includes, in addition to the value of the part taken, any diminution in the value of the remainder caused by the taking, or "severance damages." *Bauman* v. *Ross,* 167 U. S. 548, 574 (1897); *Sharp* v. *United States,* 191 U. S. 341, 351-352, 354 (1903); *United States* v. *Grizzard,* 219 U. S. 180, 183-185 (1911); *United States* v. *Miller,* 317 U. S. 369, 376 (1943); cf. *Campbell* v. *United States,* 266 U. S. 368 (1924). Accordingly, where damages to the remainder are established, the measure of compensation is the difference between the value of the whole tract before the taking and the value thereafter of the remainder. *Stephenson Brick Co.* v. *United States,* 110 F. 2d 360 (C. C. A. 5, 1940); *Baetjer* v. *United States,* 143 F. 2d 391, 396 (C. C. A. 1, 1944), certiorari denied 323 U. S. 772; *Porrata* v. *United States.* 158 F. 2d 788, 789-790 (C. C. A. 1, 1947); cf. *Puget Sound Power & L. Co.* v. *Public Utility Dist. No. 1,* 123 F. 2d 286, 290 (C. C. A. 9, 1941), certiorari denied 315 U. S.

814. This measure necessarily comprehends the value of the land that has been taken as well as the diminution in value suffered by the remainder.

Here the company could not claim any part of the value of the condemned land. For, as the Statement shows (p. 6, *supra*), it had relinquished to the fee owners whatever interest in that land its expenditures had created. Nonetheless it claimed the difference between the value of the whole plantation before the takings and the value of the remainder thereafter. And on this basis the trial court made its award. It can be sustained only if the entire difference represents (as the company claimed) a diminution in the value of the remainder and that—unlike what would be usual—none of it is attributable to the land that was taken. As it happens, the difference can be identified. This is so because, before the trial of this case, the company had applied to Congress for relief (see Statement, p. 5, *supra*). A comparison of that application and this claim makes plain that the difference represents the interest in the condemned land which the company relinquished to the fee owners and not a diminution in value of the remainder of the plantation.

Concerning the application to Congress, the trial court said that (R. 489): "the Company represented to Congress in unmistakable language that it was asking for relief at its hands because it had suffered a capital or business loss for which it had no remedy at law." The nature of that loss was described in the report of the House Committee on Claims (R. 1542-1566). Referring to an exhibit prepared by the company, the Committee said (R. 1550): "It showed that * * * plantations had an average investment of $1,023 per acre of arable sugar cane-producing lands, and that actual investment in capital of this claimant in 1939 before any expropriations of leased lands had occurred was $983 for every acre in production. After the takings the exhibit showed that the investment for the same purpose rose to $1,512 per acre." (This conforms to the testimony at the trial which was (R. 489) "that the Company suffered a capital loss at the rate of $1,000 per cane acre as it takes

that number of dollars to turn virgin land into land capable of growing sugar cane successfully.") The Committee report ascribed the company's loss to the fact (R. 1553-1554): "that each of the leases upon the lands referred to in all of the aforesaid condemnation suits contained identical clauses inserted on the insistence of the lessors and which clause terminated the lessee's interest in any lands leased upon condemnation thereof. Thus, the claimant had no recourse but to appeal to Congress * * *."[5] In other words: The company had invested in leased cane land at the rate of about $1,000 an acre. It had relinquished to the lessors its right in case of condemnation of such land to share in the compensation. As a result of this relinquishment it had lost what it invested. In short, the company had lost the money it had invested in the condemned lands. But since this loss resulted from the company's agreements with its lessors and not from the Government's condemnation of the land, the company had no claim against the Government. Hence, the petition to Congress.

However, the presence of these condemnation clauses did not alter the fact that the company's expenditures enhanced the value of the plantation. Pre-condemnation value was the same as it would have been in the absence of these provisions. The value of property does not depend upon the agreements made by those interested in it as to disposition of the proceeds in the event of sale or other alienation.

So, when to support its claim for severance damages the company had its witnesses testify to the value of the plantation before the takings, it is plain that this value embraced the interest or increment in value created by the company's investments. And when the same witnesses testified to the value of the remainder, it is equally plain that they excluded this element because, condemnation having occurred, it had

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[5] In its "Summary," the Committee found (R. 1554): "That the claimant conducted its business according to the accepted and long-established business customs in the Territory of Hawaii but is without legal remedy because of the termination of its contractual rights under the terms of its leases which were drawn in accordance with standards of business prevailing in Hawaii."

ceased to belong to the company. This being so, there can be no doubt that the difference between the two figures represents value of the land taken and not a diminution in the value of the remainder of the plantation.

The conclusion can be proved by considering the situation which would have existed if the leases had not contained condemnation clauses. In that event the company would have shared in the compensation paid for the fee value of the leased lands and as a result would have recovered its investment. Having so recouped, it could not have obtained it again in the guise of severance damages. Certainly, its self-imposed inability to recoup does not enlarge the constitutional liability of the United States.

It is thus apparent that the testimony that—as it was accurately summarized by the trial court (R. 490)—"a buyer * * * would pay less, at the rate of $1,000 an acre for each cane acre taken, for what was left of the plantation's physical property and its permanent improvements" did not, as the court deduced (R. 491) show that the company had "proven its claim that its remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken." The testimony simply showed that each cane acre taken diminished the value of the plantation—or the company—by $1,000. The remainder, however, was worth as much as it had been worth when part of the larger plantation. Therefore, it was not diminished in value by the reduction in size effected by the takings. The correctness of this can be illustrated:

First. In valuing the property, the company's witnesses proceeded on the theory that value could be determined by multiplying the number of acres under lease by $1,000. According to them, an added acre increased the aggregate by $1,000; an acre taken away subtracted $1,000 from the total. Each acre was worth the same. In this fashion they valued the 4300 acres (before the takings) at about $4,000,000 and the remaining acreage at $1,000,000 less. Since the smaller number of acres was valued at the same rate per acre as the larger number, it must follow that the value of the smaller number, *i.e.*, the remainder of the plantation,

was not diminished by severance from the condemned acreage.

Second. If the remaining property had "decreased in value at the rate of $1,000 an acre for each cane acre taken," the value before the takings of that property as distinguished from all the property is ascertainable. Use may be made of the typical valuations of Mr. Schmutz. On the basis of 4,283 acres (R. 687), he valued the plantation at $4,200,000 (R. 686). On the assumption that the condemned lands included 1,087 leased acres, he valued the remainder of the plantation (4,283 acres minus 1,087 acres, or 3,196 acres) at $3,113,000 (R. 687). Now if by the takings the remaining property had decreased in value at the rate of $1,000 for each acre taken, then it would follow that before the takings the same property was worth $3,113,000 (its subsequent value) plus $1,087,000 (1,087 acres multiplied by $1,000) or $4,200,000. But since the testimony was that value could be determined by multiplying the number of leased acres by $1,000, the 3,113 acres could never have been worth $4,200,000. On the contrary, it is plain they were always worth $3,113,000. Therefore, their value was not diminished by the takings.

Since the company's loss resulted from the condemnation clauses in its leases it is evident that, although its witnesses testified that as a result of the takings the plantation became unprofitable because its improvements were excessive, they did not ascribe the value of the remainder to that fact. Consequently, there is no need to consider whether—as was thought in *Baetjer* v. *United States,* 143 F. 2d 391, 396 (C.C.A. 1, 1944), certiorari denied 323 U. S. 772—the inability profitably to operate the remainder would diminish its market value and so give rise to severance damages.[6] On the record in the *Baetjer* case, that decision may be correct. But

[6] After a petition by the Government for certiorari was denied, 323 U. S. 772, the trial court heard testimony and found that while the owners had suffered a business loss, there was no evidence that the remaining properties had depreciated in value. *United States* v. *7936.6 Acres of Land,* 69 F. Supp. 328, 332 (P. R. 1947). That ended the case.

since sugar plantations are rarely bought and sold and it is therefore necessary to call on "experts," the danger that they will transform a business loss into a diminution of market value is apparent. *United States* v. *Certain Land,* 79 F. Supp. 873, 876-877 (S.D. N.Y. 1948). This danger is illustrated by the fact that in this case, the able and candid trial court—erroneously supposing that the company's witnesses were testifying to a diminution in value of the real property resulting from conversion of a profitable business into a losing one—was confused and disturbed by the "magic" of the experts and yet felt compelled to yield to them and to enter the judgment appealed from.

Fortunately, this result need not be accepted. For as has been demonstrated, the *Baetjer* decision (which in any event would not control this Court) is not in point. And, since the difference between the value of the whole plantation before the takings and the value of the remainder thereafter is attributable to the land that was taken, the award of damages for the remainder is wrong.

CONCLUSION

For the foregoing reasons, it is submitted that so much of the judgment as awards the company compensation for "severance damages" should be reversed.

Respectfully,

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March 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 825243 417